No. 94-72

Supreme Court, U.S.
FILED
AUG 11 1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SANDLER ASSOCIATES, L.P. *et al.*,

Petitioners,

—against—

BELLSOUTH CORPORATION *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Kevin D. McDonald*
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Suite 600
Washington, D.C. 20005-2008
(202) 879-3939

Attorneys for Xavier W. Nady, John N. Palmer, C. Victor Raiser, II, Thomas G. Barksdale, R. Faser Triplett, M.D., and E. Lee Walker

Warren R. Stern*
Ben M. Germana
WACHTELL, LIPTON, ROSEN
& KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

Attorneys for BellSouth Corporation and Mobile Communications Corporation of America

* *Counsel of Record*

August 10, 1994

BEST AVAILABLE COPY

34 pp

QUESTION PRESENTED

The District Court entered a judgment dismissing petitioners' claims. The judgment gave effect to a class action settlement that concededly embraced those claims. The settlement had been approved by a final state court judgment in an action in which the petitioners had been among the named plaintiffs and had been permitted to take discovery concerning the merits of the action and the settlement. The state court had approved the settlement after a hearing in which the petitioners vigorously litigated their objections to the settlement, including their claims that the settlement was unfair and unreasonable, could not include a release of federal claims, and could not be approved without an opt-out right. The Delaware Supreme Court affirmed that order and this Court denied a petition for a writ of certiorari based upon the same claims of federal right asserted here. The Court of Appeals for the Third Circuit affirmed the judgment of the District Court dismissing these claims. Was this error?

PARTIES TO THE PROCEEDING

The petitioners, appellants in the Court of Appeals, are Sandler Associates, L.P. and Daniel R. McCarthy.

The respondents, appellees in the Court of Appeals, are BellSouth Corporation;* Mobile Communications Corpora-

---

* The corporate subsidiaries (except wholly-owned subsidiaries) and affiliates of BellSouth Corporation are: Movicel S.A.; 1155 Peachtree Associates; Bell Communications Research Inc.; Bellcore Ventures, Inc.; Database Service Management, Inc.; InfoVentures; InfoVentures of Atlanta; ITT World Directories, Inc.; ITT World Directories (U.K.) Ltd.; Uniquest Incorporated; Optus Communications Pty. Limited; Optus Administration Pty. Limited; Optus Mobile Pty. Limited; Optus Networks Pty Limited; AUSSAT Finance Limited; AUSSAT New Zealand Limited; Optus Superannuation Pty. Limited; Optus Systems Pty. Limited; Telcell S.A.; Movicom S.A.; Telefonia Movel do Sul S.A.; Compania de Telecomunicaciones Comtal Limitada; Movicom Colombia S.A.; Centweight B.V.; E-Plus Mobilfunk GmbH; Beijing Ji Tong-BellSouth Communication & Information Engineering Co., Ltd.; TCIL BellSouth Limited; B.A. Celular Inversora S.A.; Compania de Radiocomunicaciones Moviles S.A.; R.A. Celular Inversora S.A.; CTM S.A.; DMT Dansk Mobiltelefon I/S; Compagnie Financiere pour le Radiotelephone S.A.; Societe Francaise du Radiotelephone; PCN One Limited; Telcel Celular, C.A.; Promociones 4222, S.A.; ROU Celular Inversora S.A.; Abiatar S.A.; Australia New System L.P.; BellSouth Mobile Data Australia Pty Limited; RAM/BSE Communications L.P.; Belgium New System L.P.; RAM Mobile Data Belgium, S.C.S.; RAM Mobile Data Belgium SC; France New System L.P.; France Telecom Mobiles Data, S.A.; Germany New System L.P.; RAM Mobile Data Network GmbH; GFD Gesellschaftfuer Datanfunk GmbH; Honolulu Cellular Telephone Company; Netherlands New System L.P.; RAM Mobile Data C.V.; RAM Mobile Data (Netherlands) B.V.; RAM Mobile Data Limited; RAM Mobile Data USA Limited Partnership; RAM Communications Consultants, Inc.; RAM Communications Consultants Limited; RAM Communications Consultants of Australia Pty. Ltd.; ST Mobile Data Pte. Ltd.; National Cellular Communications, Inc.; Gulf Coast Cellular Telephone Company; Charisma Communications Corp. of the Southwest; Houston Mobile Cellular Communications Company; Houston Cellular Telephone Company; Galveston Cellular Partnership; Galveston Cellular Telephone Company; Galveston Mobile Partnership; Gary Cellular Telephone Company; Cellular Systems; MCTA; Los Angeles RCCs, Inc.; Los Angeles

tion of America ("MCCA");* BLS Acquisition Corp., I, Inc.;** Xavier W. Nady; John N. Palmer; C. Victor Raiser, II; Thomas G. Barksdale; R. Faser Triplett, M.D.; and E. Lee Walker. The individual respondents were directors of MCCA prior to its merger with BellSouth.

Cellular Corporation; Los Angeles Cellular Telephone Company; Bloomington Cellular Telephone Company; Kokomo Celltelco Partnership; Muncie Cellular Telephone Company, Inc.; Terre-Haute Cellular Telephone Company, Inc.; Green Bay CellTelCo; Janesville Cellular Telephone Company, Inc.; Madison Cellular Telephone Company; Racine Cellular Telephone Company; Sheboygan Cellular Telephone Company, Inc.; RCTC Wholesale Company; RCTC Wholesale Corporation; Richmond Cellular Telephone Company; Acadiana Cellular General Partnership; Huntsville MSA Limited Partnership; Tele-Man Ltd.; Cell-Com Israel Ltd.; B-Side Carriers L.P.; Cellular Radio of Chattanooga; Chattanooga MSA Limited Partnership; Centel Cellular Company of Hickory; Centel Cellular Company of North Carolina; Centel Cellular Company of Tallahassee; Century Cellunet of North Louisiana Cellular Limited Partnership; Decatur RSA Limited Partnership; Jacksonville MSA Limited Partnership; Florida RSA #2B (Indian River) Limited Partnership; Georgia RSA No. 1 Limited Partnership; Georgia RSA No. 2 Limited Partnership; Georgia RSA No. 3 Limited Partnership; Baton Rouge MSA Limited Partnership; Lafayette MSA Limited Partnership; Louisiana RSA No. 7 Cellular General Partnership; Louisiana RSA No. 8 Limited Partnership; Memphis SMSA Limited Partnership; Nashville/Clarksville MSA Limited Partnership; North Carolina RSA 15 North Sector Limited Partnership; Northeastern Georgia RSA Limited Partnership; Orlando SMSA Limited Partnership; Columbia MSA Limited Partnership; South Carolina RSA No. 4 Cellular General Partnership; South Carolina RSA No. 5 Cellular General Partnership; South Carolina RSA No. 6 Cellular General Partnership; FWS Radio, Inc.; Skilldex, Inc.; CSL Associates; CSL Chastain Associates; CSL Colonnade Associates; CSL Exchange South Associates; CSL Twelfth Street Associates; and CSL Western Way Associates.

* MCCA's only subsidiaries or affiliates that are not wholly-owned subsidiaries are Skilldex, Inc. and FWS Radio, Inc.

** BLS Acquisition Corp. was a Delaware corporation formed by BellSouth for the purpose of implementing its merger with MCCA.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

REFERENCE TO OPINIONS DELIVERED IN CASE BY OTHER COURTS 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 2

A. Preliminary Statement 2

B. The Prior Proceedings in this Matter 4

1. The Delaware State Court Proceedings 4

2. The Federal Proceedings 9

REASONS FOR DENYING THE WRIT 12

A. This Case is an Inappropriate Vehicle for Review of the Issues that Petitioners Contend it Presents 12

B. Petitioners Have Failed to Show that the Court of Appeals Rendered a Decision in Conflict with Any Decision of this Court or Other Court of Appeals 14

PAGE

1. Settled Principles of Full Faith and Credit Bar this Collateral Attack on the Delaware Judgment 14

2. Having Litigated Their "Opt-Out" Claim in the Delaware Courts, Petitioners May Not Relitigate that Claim in the Federal Courts 16

3. Having Litigated Their Claim in the Delaware Courts that the State Court Judgment Could Not Release Their Federal Claims, Petitioners May Not Relitigate that Claim in the Federal Courts 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases PAGE

Abramson v. *Pennwood Investment Corp.*, 392 F.2d 759 (2d Cir. 1968) 9n

Allen v. *McCurry*, 449 U.S. 90 (1980) 18

Bernstein v. *Mediobanca Banca di Credito Finanziario-Societa Per Azioni*, 78 F.R.D. 1 (S.D.N.Y. 1978). 19

City of Detroit v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) 15

Dosier v. *Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981) 14n

Ezzes v. *Ackerman*, 234 A.2d 444 (Del. 1967)..... 14

Girsh v. *Jepson*, 521 F.2d 153 (3d Cir. 1975)..... 15

Golden v. *Pacific Maritime Ass'n*, 786 F.2d 1425 (9th Cir. 1986) 14n

Grimes v. *Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *petition for cert. filed*, (June 29, 1994) 21n

Hacopian v. *United States Dep't of Labor*, 709 F.2d 1295 (9th Cir. 1983) 11n

Henderson v. *Griffin*, 30 U.S. (5 Pet.) 151 (1831)..... 11n

In re Antibiotic Antitrust Actions, 333 F. Supp. 296 (S.D.N.Y.), *aff'd per curiam sub nom. Connors* v. *Chas. Pfizer & Co.*, 450 F.2d 1119 (2d Cir. 1971), *cert. denied*, 408 U.S. 930 (1972) 14n

In re Corrugated Container Antitrust Litig., 643 F.2d 195 (5th Cir. 1981) 19, 20n

PAGE

In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979) 20n

In re Washington Pub. Power Supply Sys. Sec. Litig., 720 F. Supp. 1379 (D. Ariz. 1989), *aff'd sub nom. Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268 (9th Cir.), *cert. denied*, 113 S. Ct. 408 (1992).... 19

Kincade v. *General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981) 8n

King v. *South Central Bell Telephone & Telegraph Co.*, 790 F.2d 524 (6th Cir. 1986)..... 14n

Kremer v. *Chemical Construction Corp.*, 456 U.S. 461 (1982) 14

Laskey v. *UAW*, 638 F.2d 954 (6th Cir. 1981) 14n

Lowenschuss v. *Resorts Int'l, Inc.*, Civ. A. No. 89-1071, 1989 U.S. Dist. LEXIS 7407 (E.D. Pa. June 29, 1989) 19

Marrese v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985) 19n

Mars Steel Corp. v. *Continental Illinois Nat'l Bank & Trust Co. of Chicago*, 834 F.2d 677 (7th Cir. 1987) 15

National Super Spuds, Inc. v. *New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981) 20

Nottingham Partners v. *Dana*, 564 A.2d 1089 (Del. 1989) 8n, 14

Nottingham Partners v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991)..... *passim*

PAGE

Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 16

Piambino v. *Bailey*, 610 F.2d 1306 (5th Cir.), *cert. denied*, 449 U.S. 1011 (1980) 20n

Reynolds v. *NFL*, 584 F.2d 280 (8th Cir. 1978) 15

Stella v. *Kaiser*, 218 F.2d 64 (2d Cir. 1954), *cert. denied*, 350 U.S. 835 (1955) 14n

Stoetzner v. *United States Steel Corp.*, 897 F.2d 115 (3d Cir. 1990) 17n

TBK Partners, Ltd. v. *Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982) 8n

Ticor Title Ins. Co. v. *Brown*, 114 S. Ct. 1359 (1994) . 3, 12

Underwriters Nat'l Assurance Co. v. *North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691 (1982) 18, 19

Walsh v. *Great Atlantic & Pacific Tea Co.*, 726 F.2d 956 (3d Cir. 1983) 15

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1738 ..... *passim*

Rules

Delaware Chancery Court Rule 23(b)(1) 8

Delaware Chancery Court Rule 23(b)(2) 8

Delaware Chancery Court Rule 23(b)(3) 8

Fed. R. Civ. P. 23(e) 15

PAGE

Treatises

Charles A. Wright et al., *Federal Practice and Procedure* § 4470 (1981) 19

I D.B. Dobbs, *Law of Remedies* § 2.1(2) (2d ed. 1993) 17n

REFERENCE TO OPINIONS DELIVERED IN CASE BY OTHER COURTS

The opinion of the Court of Chancery of the State of Delaware approving the class action settlement and overruling petitioners' objections, *In re Mobile Communications Corp. of America, Inc., Consolidated Litigation*, is reported at Fed. Sec. L. Rep. (CCH) [1991-1992 Transfer Binder] ¶ 96,558 (Del. Ch. 1991) (also available at 1991 Del. Ch. LEXIS 4), and is reprinted in the annex to the petition for a writ of certiorari (the "Annex") at 76A-107A. The decision of the Supreme Court of Delaware affirming the judgment of the Court of Chancery and rejecting petitioners' appeal is reported at 608 A.2d 729 (Del. 1992) and is reprinted in the Annex at 69A-70A. The Order of this Court denying petitioners' application for a writ of certiorari to the Supreme Court of Delaware is reported as *Fleck* v. *Mobile Communications Corp. of America, Inc.*, 112 S. Ct. 3032 (1992), and is reprinted in the appendix to this Brief at 1A.

The opinion of the United States District Court for the District of Delaware granting summary judgment dismissing this action is reported as *Sandler Associates, L.P.* v. *BellSouth Corp.*, 818 F. Supp. 695 (D. Del. 1993), and is reprinted in the Annex at 4A-29A. The decision of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court is reported at 26 F.3d 123 (3d Cir. 1994) and is reprinted in the Annex at 1A-2A.

STATEMENT OF JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) to review by certiorari a judgment of the United States Court of Appeals for the Third Circuit entered on April 12, 1994. As respondents demonstrate in this Brief, there is no reason for this Court to assert jurisdiction in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

This case involves the Full Faith and Credit Act, 28 U.S.C. § 1738, which provides:

> **§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit.**
>
> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

A. Preliminary Statement

This is a collateral attack on a judgment of a Delaware court. The attack is brought by persons who were parties to the Delaware proceedings and whose objections to the judgment were heard and rejected by the Delaware court. The judgment was affirmed by the Supreme Court of Delaware

following an appeal taken by these petitioners. Petitioners asked this Court to review the judgment on certiorari, but this Court declined to do so.

Notwithstanding the state court judgment, petitioners insisted in the federal district court in Delaware that they were free to litigate their claims, raising the same arguments on which they had failed in the state courts. The federal district court gave full faith and credit to the Delaware judgment and dismissed the case. Petitioners then appealed to the United States Court of Appeals for the Third Circuit, which affirmed.

Petitioners now return to this Court, claiming that the issues are so important as to merit exercise of this Court's certiorari jurisdiction — jurisdiction which this Court refused to exercise when asked to review the judgment of the Supreme Court of Delaware. They make this claim notwithstanding the fact that the Delaware judge, well-experienced in corporate litigation, declared their substantive theory to be "one of the weakest" he "had ever encountered in the court" (79A); notwithstanding the fact that the Supreme Court of Delaware affirmed the judgment of the lower court by summary order; notwithstanding the fact that this Court declined to review that judgment; notwithstanding the fact that the Third Circuit affirmed the judgment of the federal district court in one sentence; and notwithstanding the fact that this Court made clear in *Ticor Title Ins. Co.* v. *Brown*, 114 S. Ct. 1359 (1994), that it will not grant certiorari to review dismissals of collateral attacks on judgments certifying class actions without provision for opt-outs. Petitioners, moreover, claim that this case presents important issues for review by this Court even though they have not cited a single case that has permitted a collateral attack on a state court judgment by a party to the proceeding from which that judgment emerged. This petition should be denied.

B. The Prior Proceedings in this Matter

1. The Delaware State Court Proceedings

In February 1988, MCCA, a Delaware corporation, agreed to be acquired by BellSouth. The merger agreement provided, among other things, that (i) MCCA would distribute to its shareholders all of the stock of an MCCA subsidiary owning businesses that BellSouth would not acquire, and (ii) each share of MCCA would be converted into shares of BellSouth stock worth $28.75. MCCA shareholders, by the affirmative vote of 89% of those shares voted, approved the agreement in August 1988, following a proxy solicitation. The proxy statement reprinted the merger agreement and summarized its terms.

In February 1989, while regulatory approvals for the merger were pending, BellSouth commenced an action in the Court of Chancery for the State of Delaware, seeking a declaratory judgment that the merger agreement was binding and enforceable and that no event that would permit termination had occurred. 84A-85A. Several shareholders of MCCA — including petitioners — then commenced four actions in the Court of Chancery (thereby submitting to the Court's jurisdiction, although no state or federal rule required that choice of forum). These shareholder actions sought to enjoin MCCA from completing the merger; each action named MCCA, its directors and BellSouth as defendants,* and each was purportedly brought on behalf of all MCCA shareholders. The shareholder actions, and BellSouth's declaratory judgment suit, were consolidated by the Court.

---

* Also named as defendant in one of the actions was BLS Acquisition Corp., and named in three of the actions was Mobile Telecommunications Technologies Corp., a Delaware corporation, formed and owned by MCCA, whose stock was to be distributed to the MCCA shareholders prior to the merger. Certain directors of BellSouth were named as defendants in one of the actions but were never properly served with process.

The shareholder plaintiffs asserted that, by reason of an alleged increase in the value of MCCA subsequent to the signing of the merger agreement, the directors of MCCA were obligated as fiduciaries—and were allegedly permitted by the merger agreement—to abandon the merger and seek a superior acquisition offer for the company. BellSouth asserted that, the merger having been approved by the MCCA shareholders, MCCA was not permitted to terminate the merger; MCCA and its directors asserted that, in light of the merger agreement's express "no shop" provision and narrowly drawn termination clause, the merger agreement could be terminated only if MCCA received an unsolicited acquisition offer and if the Board determined, on the advice of counsel, that it was required by its fiduciary duties to accept that offer. It was undisputed that no such offer had been received and that the merger agreement barred solicitation of such an offer.

The shareholder plaintiffs, including petitioners, moved for a preliminary injunction against the merger and took document and deposition discovery in support of that motion. The plaintiffs argued (and petitioner Sandler Associates, L.P., amended its complaint to allege) that if MCCA were not permitted to abandon the agreement by reason of an asserted change in value, then the merger proxy statement would have been misleading, in violation of the MCCA directors' duty of candor under Delaware law, because it would have failed to disclose that the merger agreement would be so interpreted.

On March 29, 1989, the Court of Chancery denied a preliminary injunction. In its opinion, the Court observed that "[t]his case, as refined by the presentation of counsel at oral argument, presents at this stage principally a question of the adequacy of the disclosure made in the joint solicitation of proxies in connection with the MCCA shareholder approval of the Agreement" (109A). The Court found that the merger agreement could not be interpreted to permit termination merely on the basis of an asserted change in the value of MCCA. The Court held that by reprinting and accurately

summarizing the terms of the agreement, the proxy statement had fully and fairly disclosed those terms. The Court explained that "none of the disclosures made to shareholders reflect[ed] an inaccurate statement concerning the scope or meaning" of the termination provision of the agreement (110A); no relevant fact or conclusion had been omitted from the proxy statement (110A-111A); and the proxy statement could not be said to have contributed to a mistaken interpretation that the agreement granted to the MCCA directors "a broad 'fiduciary out' " (112A).

An agreement to settle the consolidated actions was reached on April 1, 1989 (86A). The settlement agreement, conditioned upon Court of Chancery approval as required by Chancery Rule 23(e), provided that, in consideration of a release from any liability to the class with respect to the merger, the defendants would increase the value to the MCCA shareholders, on a share-by-share basis, of the merger and related stock distribution by (i) increasing the number of BellSouth shares to be received by each MCCA shareholder in the merger, (ii) timing the merger so that the MCCA shareholders would receive the cash dividend declared by BellSouth for the first quarter of 1989, and (iii) increasing the capital of the MCCA subsidiary whose stock was to be distributed immediately prior to the merger (86A). The Court of Chancery valued these benefits at $35 million (*see* 80A; 99A).

Petitioners refused to agree to the settlement or even to participate in the final round of settlement discussions (85A). They instead applied for leave to appeal from the denial of the preliminary injunction, and for a stay of the merger pending that appeal (78A-79A). Their application was denied on April 3, 1989 by the Court of Chancery. In so doing, the Chancellor observed that this had been "one of the weakest cases legally for the issuance of a preliminary injunction that I have ever encountered in the court." (79A). The Supreme Court of Delaware rejected petitioners' interlocutory appeal application on April 4, 1989 (80A). After the Supreme Court

announced its ruling, MCCA completed the stock distribution to its shareholders contemplated by the merger agreement, and then merged with a subsidiary of BellSouth (80A; 87A).

On June 6, 1989, the settling parties moved in the Court of Chancery for an order approving the settlement on behalf of a class certified under Chancery Rules 23(b)(1) and 23(b)(2) (equivalent to Fed. R. Civ. P. 23(b)(1) and 23(b)(2)), and directing that notice of a hearing on the settlement be provided to all members of the proposed class.

Petitioners asked the Court of Chancery to reject the settlement summarily and to appoint them as class representatives. On August 14, 1989, the Court of Chancery provisionally rejected these requests and scheduled a hearing on the settlement, upon notice to all proposed class members. The Court granted petitioners the right to conduct discovery concerning the settlement, and to include a statement of reasons for their objections to the settlement in the hearing notice.

Nine days later, petitioners—who had invoked the jurisdiction of the Delaware courts, but whose proxy misrepresentation claims had been rejected and whose efforts to be appointed class representatives had been unsuccessful—commenced an action in the United States District Court for the District of Delaware. The action, in which petitioners were represented by the same counsel as in the Court of Chancery, named as defendants BellSouth, MCCA and all but one of the former directors of MCCA—all also defendants in the Court of Chancery action. The federal complaint repeated the allegations about the MCCA proxy statement that had been made in the Court of Chancery but attempted to frame them as violations of the federal securities laws. The federal complaint also alleged that the directors of MCCA had breached fiduciary duties in completing the merger and in agreeing to settle the Court of Chancery action. The federal complaint prayed for compensatory damages of "at least $850,000,000" and treble damages under the Racketeer Influenced Corrupt Organizations Act of "at least $2.55 billion" (66A).

Even after seeking to move their claims to a federal forum, petitioners continued to participate in the Court of Chancery action. They maintained their objections to the proposed settlement, inserted in the class notice a statement of reasons for their objections, and took discovery in support of those objections.* Petitioners also submitted briefs prior to and presented oral argument at the settlement hearing held on January 18, 1990.

On January 7, 1991, the Court of Chancery ruled that the consolidated shareholder action was properly maintained as a class action under Chancery Rules 23(b)(1) and 23(b)(2), and that (with one modification not here relevant) the settlement was fair and reasonable to the class. In so doing, the Court of Chancery analyzed the settlement "value" of all of the class claims, including federal claims, and concluded that the $35 million in settlement benefits represented fair consideration for the release of those claims. The Court rejected petitioners' argument that due process, as construed in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), required that class members be given the right to opt out of the class. Relying mainly on federal authorities, the Court of Chancery rejected petitioners' argument that a state court could not approve a release unless it excluded federal claims.** The Court also rejected petitioners' attack upon the

---

* Thus, in support of their opposition to the settlement, petitioners (i) took document discovery from defendants and settling plaintiffs' counsel; (ii) deposed the lawyers for the settling plaintiffs; and (iii) deposed (for a second time) the MCCA Chairman and Chief Executive Officer as to MCCA's reasons for proceeding with the merger. This discovery supplemented the deposition and document discovery taken by petitioners in support of their preliminary injunction motion, which included all documents pertaining to the termination clause in the merger agreement and depositions of MCCA's directors and its financial and legal advisors.

** *See* 106A (opinion of the Court of Chancery), *citing Nottingham Partners* v. *Dana*, 564 A.2d 1089 (Del. 1989); *TBK Partners, Ltd.* v. *Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982); *Kincade* v. *General*

good faith of the settling parties (97A-99A). On February 6, 1991, the Court entered an Order and Final Judgment certifying the class, approving the settlement and dismissing the consolidated action with prejudice (71A-75A).

On February 4, 1992, the Supreme Court of Delaware, upon appeal by petitioners, affirmed the Order and Final Judgment, for the reasons set forth in the Court of Chancery's January 7, 1991 opinion. The petitioners then sought certiorari from the Supreme Court of the United States, which was denied on June 29, 1992. *See* Appendix to this Brief at 1A.

2. The Federal Proceedings

On July 28, 1992, respondents moved for summary judgment dismissing the federal action on the principal ground that all claims had been released in the settlement. Petitioners argued in opposition that (1) the judgment of the Court of Chancery was not entitled to "full faith and credit" because there had been no "actual adjudication" of the "merits" of the disclosure claims, and there were factual issues concerning the adequacy of the proxy statement disclosures and whether the settlement was "coerced"; (2) the Court of Chancery had denied the class members' right to opt out of the settlement, a right assertedly recognized in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985); and (3) a federal court may not give effect to a release approved by a state court to the extent it included exclusive federal claims. Petitioners did not contest that they were members of the class certified by the Court of Chancery, that the settlement and release embraced all the claims asserted in the federal action, and that they had raised all their objections to the settlement in the Delaware courts.

On April 12, 1993, the District Court granted summary judgment (3A; 4A-29A). The District Court found that:

Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981); *Abramson* v. *Pennwood Investment Corp.*, 392 F.2d 759 (2d Cir. 1968). *See also Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991).

(1) the "claims asserted in this action are encompassed within the state court release and have been released on behalf of a class that indisputably includes the Plaintiffs" (25A); (2) the release "was approved by the Delaware state courts only after notice and full consideration of the Plaintiffs' objections to the settlement and release" (25A); (3) "Plaintiffs are not only members of the class, but themselves chose to commence the state court class actions in which the release was given and judicially approved" (26A); and (4) Plaintiffs "commenced the federal action only after the Court of Chancery refused to appoint them as class representatives and directed that a hearing be held to consider a settlement proposed by other class action plaintiffs," and "[e]ven after commencing this action, they chose to continue to litigate their objections to the settlement in the Delaware state courts," where they "were given, and vigorously exercised, a constitutionally adequate opportunity to be heard" (26A).

The District Court noted that "federal courts have uniformly dismissed claims, including claims committed to their exclusive jurisdiction, that have been released in settlement of class actions brought in state courts" (23A). The Court pointed out that "[t]o deny effect to a release of claims merely because it was given in an action commenced in state court would invite unprecedented consequences," and "would unjustifiably proliferate litigation, defeat legitimate expectations of the settling parties, engender uncertainty among class members and defendants as to their ability to retain the benefits of settlements, discourage settlements altogether and create unwarranted conflict between state and federal courts" (25A).

The Court rejected the petitioners' "opt-out" argument on the ground that *Phillips Petroleum* was concerned with absentee class members, not persons like petitioners, who "were parties to and actively participated" in the state court action and "consented to the [state court's] jurisdiction by filing their class action suit there" (28A). The Court also found that

"the Plaintiffs were given, and vigorously exercised, a constitutionally adequate opportunity to be heard on this issue," and therefore the Court could not "review the propriety of the class certification and their inclusion in the class" (28A).

Petitioners appealed the judgment of the District Court to the United States Court of Appeals for the Third Circuit. The Court of Appeals, after oral argument, issued a judgment order on April 12, 1994 (without opinion) affirming the judgment of the District Court (1A-2A).* On July 11, 1994, petitioners once again filed a petition for a writ of certiorari in this Court, seeking to raise many of the same issues they had sought to raise in their previous petition for certiorari from the decision of the Supreme Court of Delaware.**

---

* The Court of Appeals taxed costs against petitioners and in favor of BellSouth Corporation in the amount of $1,174.42. Notwithstanding requests to counsel for petitioners for payment, these costs remain unpaid, and counsel for petitioners has not indicated that payment is forthcoming. Accordingly, this Court should deny the Petition for the reason that, aside from its lack of substantive merit, a Court may refuse to consider further actions in a case by a party that has failed to pay costs awarded in a judgment, *see, e.g., Hacopian* v. *United States Dep't of Labor*, 709 F.2d 1295, 1296 (9th Cir. 1983) (*citing Henderson* v. *Griffin*, 30 U.S. (5 Pet.) 151 (1831)).

** Respondents have not attempted to respond here to each assertion of supposed "fact" in petitioners' Statement of the Case, but rather only those relevant to this Court's consideration of the petition. Respondents note, however, that petitioners' version of events—*e.g.*, that the merger agreement provided BellSouth with "a virtually irrevocable call in favor of BellSouth at [a] relatively low price" (Pet. at 6); that the settlement was "secretly negotiated" (Pet. at 5); that the settlement in the Court of Chancery was "meager" (Pet. at 8); and that the MCCA directors were self-interested and lacked good faith (Pet. at 10-11)—is unfounded and was rejected by the Supreme Court of Delaware and the Court of Chancery. *See, e.g.*, 69A-70A; 78A-80A; 88A-106A.

REASONS FOR DENYING THE WRIT

A. This Case is an Inappropriate Vehicle for Review of the Issues that Petitioners Contend it Presents

This case does not merit certiorari review for several reasons. First, in essence, the petition asks this Court to determine whether the Court of Chancery erred in certifying the class action under the Delaware version of Rule 23(b)(1) and (b)(2), which do not permit opt-outs, rather than the Delaware version of Rule 23(b)(3), which does permit opt-outs. This Court granted certiorari in *Ticor Title Ins. Co.* v. *Brown*, 114 S. Ct. 1359 (1994), to review a similar issue, namely, "[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf", but then dismissed certiorari as improvidently granted because "the law of res judicata" prevented the question of the propriety of non-opt-out certification from being relitigated. *Id.* at 1361.

The reasons for binding these petitioners to the prior judgment are particularly compelling because, unlike the plaintiffs in *Ticor*, they were actually parties to the first case and, indeed, sought review of this issue in this Court at that time. This Court deemed the case unworthy of certiorari review when the petitioners here filed their prior petition, and nothing has happened to make it any more worthy of such review now. Indeed, in reliance on the finality of the Delaware judgment, the parties executed the settlement, and the class — including petitioners — has enjoyed the benefits of that settlement.

Second, because petitioners actively litigated in the state court the "due process" issue they seek to present, review of that issue would be complicated by full faith and credit considerations. Before reaching the merits of the issue they seek to present, this Court would first have to determine that the

judgment of the Delaware courts is not entitled to full faith and credit. On that question, as set forth in greater detail below, the law is so clear that the Third Circuit dealt with petitioners' appeal in one sentence.

Third, petitioners have failed to show any division within the Circuits over any issue that they seek to present; they cite not a single Court of Appeals decision that disagrees with the ruling of the Court of Appeals for the Third Circuit in any respect.

Fourth, the merits of the substantive claim are exceptionally weak: petitioners' claim that the MCCA proxy statement was "misleading" was deemed by the Chancellor of the Court of Chancery — the Hon. William T. Allen, one of the most respected judges and scholars in the field of corporate law — to be "one of the weakest" he had ever seen; indeed, Chancellor Allen suggested that the "racketeering" claim was "frivolous [and] irresponsible" (79A; 93A). It is highly likely that, were the case to proceed on the merits, it would be dismissed for failure to state a claim upon which relief may be granted.

Finally, petitioners have engaged in egregious forum shopping. They initially brought their claims — both their fiduciary duty and disclosure claims — in the Court of Chancery, and resorted to federal court only after the Chancellor disparaged the merits of those claims, refused their demand to be named class representatives, and set down for hearing a settlement they opposed. This is not a case in which would-be federal plaintiffs find themselves without access to a federal forum because others have chosen to commence a class action in a state court. For this reason, granting certiorari here would encourage forum manipulation and would do violence to the comity between state and federal courts.

B. Petitioners Have Failed to Show that the Court of Appeals Rendered a Decision in Conflict with Any Decision of this Court or Other Court of Appeals.

1. Settled Principles of Full Faith and Credit Bar this Collateral Attack on the Delaware Judgment

"Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 466 (1982). The judgment of the Court of Chancery approving the settlement has been affirmed by the Supreme Court of Delaware and would unquestionably be given full effect in the Delaware courts. *See Nottingham Partners* v. *Dana*, 564 A.2d 1089, 1098-1101, 1105 (Del. 1989); *Ezzes* v. *Ackerman*, 234 A.2d 444, 445 (Del. 1967).* Petitioners have never contended otherwise.

Under the "statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, *supra*, 456 U.S. at 481. The Delaware proceedings here more than satisfied these "minimum procedural requirements." The courts appear to be unan-

---

* The federal courts have likewise routinely rejected collateral attacks on class action settlements by class members who, like petitioners, asserted their objections in the settlement proceedings. *See, e.g., Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29, 33 (1st Cir. 1991); *King* v. *South Central Bell Telephone & Telegraph Co.*, 790 F.2d 524, 529-30 (6th Cir. 1986); *Golden* v. *Pacific Maritime Ass'n*, 786 F.2d 1425, 1428 (9th Cir. 1986); *Dosier* v. *Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *Laskey* v. *UAW*, 638 F.2d 954, 956 (6th Cir. 1981); *Stella* v. *Kaiser*, 218 F.2d 64, 65, 67 (2d Cir. 1954) (derivative action), *cert. denied*, 350 U.S. 835 (1955); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 296, 297-98 (S.D.N.Y.), *aff'd per curiam sub nom. Connors* v. *Chas. Pfizer & Co.*, 450 F.2d 1119 (2d Cir. 1971), *cert. denied*, 408 U.S. 930 (1972).

imous in holding that notice and an opportunity for a "meaningful exposition" of objections is all that is required to bind objecting class members to a class action settlement. *Girsh* v. *Jepson*, 521 F.2d 153, 160 (3d Cir. 1975). *See also Mars Steel Corp.* v. *Continental Illinois Nat'l Bank & Trust Co. of Chicago*, 834 F.2d 677, 683-84 (7th Cir. 1987); *Walsh* v. *Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 965 (3d Cir. 1983); *Reynolds* v. *NFL*, 584 F.2d 280, 285 (8th Cir. 1978); *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 462-64 (2d Cir. 1974). Indeed, this is precisely what is contemplated by Rule 23(e) of the Federal Rules of Civil Procedure:

> **(e) Dismissal or Compromise**. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

In this case, petitioners were not only given notice of the proposed settlement, but were given an opportunity to, and did, include a statement of their objections in the notice. They were also given, and exercised, the right to take discovery in support of their objections. They raised and extensively briefed their objections twice in the Court of Chancery — once prior to the Court's scheduling a hearing on the proposed settlement and again at the hearing itself. Their objections were carefully considered by the Court of Chancery in a written opinion approving the settlement. Petitioners were given, and exercised, another opportunity to raise their objections by appeal to the Supreme Court of Delaware, which affirmed the judgment of the Court of Chancery after receiving briefs from the petitioners and hearing oral argument. Finally, they exercised their right to seek review from this Court of the judgment of the Supreme Court of Delaware by way of certiorari, which this Court denied. On each occasion, petitioners raised the very arguments they seek to raise on this latest petition— that they had a due process right to "opt out" of the settlement and that the settlement cannot release federal claims. If the

process afforded to petitioners here did not satisfy the due process clause, then it is unlikely any objector to a settlement of a class action—whether in state or federal court—could ever be constitutionally bound to the settlement absent a full trial on the merits.

2. Having Litigated Their "Opt-Out" Claim in the Delaware Courts, Petitioners May Not Relitigate that Claim in the Federal Courts

Petitioners have not asserted that the Delaware procedure for approving a class action is constitutionally deficient. They appear to contend that, as a substantive matter, Delaware cannot bind absent class members to a class action settlement that releases claims for monetary damages unless those absent class members are given the right to "opt out" of the settlement. They rely on this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), which held that due process was not offended by a state court class action judgment in a suit for money damages so long as persons not subject to the jurisdiction of the state court were afforded a right to opt out of the class.

Petitioners, however, simply do not stand in the position of "absent" class members: they submitted themselves to the jurisdiction of the Delaware courts by actively participating in these proceedings; indeed, petitioners themselves commenced actions in the Court of Chancery seeking to challenge the BellSouth/MCCA merger and raised the very same disclosure issues that they now seek to litigate under the rubric of the federal securities laws.* They raised their purported

---

* In any event, even as to true "absentees" (*none* of whom has sought to attack collaterally the Delaware settlement), the Court of Chancery did not make any error of law. *Phillips Petroleum* concerned the type of class actions certified under Rule 23(b)(3), *i.e.*, aggregations of claims presenting similar issues of law or fact but otherwise legally distinct and asserting individual claims for damages. These cases give rise to jurisdictional issues with respect to absent class members who

due process objection, along with their other objections, in the Delaware courts. They are thus bound by the judgment of those Courts overruling those objections. *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29, 33 (1st Cir. 1991) ("The Delaware Courts, affording all the prophylaxis which the Due Process Clause commands, adjudicated the question of whether appellants had a right, or should have been allowed, to opt out of the settlement. If, having objected and been overruled, appellants were still dissatisfied with the Delaware judgment, their recourse was to the United States Supreme Court by means of certiorari, not to the lower federal courts in the vain pursuit of back-door relief.").*

---

have no relationship with the forum. This Court held that such issues are obviated by the typical Rule 23(b)(3) procedure of permitting opt-outs, because a decision not to opt out can be deemed to manifest consent to the forum's exercise of jurisdiction. In contrast, here, the claims of all class members were homogeneous on all issues of liability and damages: the proxy solicitation and merger were either valid as to all MCCA shareholders or they were valid as to none; any monetary relief would be awarded on a per share basis and, unlike the typical securities fraud action, would not turn on individual questions of reliance or causation. The actions predominantly sought injunctive relief when brought, and post-merger relief, even if monetary in form, remained equitable in character. *See* 1 D.B. Dobbs, *Law of Remedies* § 2.1(2) at 61-62 (2d ed. 1993). No rights of opt-out are required in class actions of this type. *See, e.g., Stoetzner* v. *United States Steel Corp.*, 897 F.2d 115, 119-20 (3d Cir. 1990).

* Petitioners make an elaborate effort (Pet. 3-4) to distinguish *Nottingham Partners* v. *Trans-Lux Corp., supra*. None of their "distinctions" is valid: (1) *Nottingham*, like this case, involved a class action certified under Chancery Rule 23(b)(2), 925 F.2d at 32, not a "shareholder's derivative suit" as petitioners mistakenly assert (Pet. 3); (2) the BellSouth/MCCA merger did not "moot" the actions complaining about the merger merely because an injunction against that merger was no longer available; other remedies, including rescission or its monetary equivalent, remained available; (3) petitioners' effort to distinguish *Nottingham* on the basis of remedies (Pet. 3) is refuted by the opinion itself: the Court emphasized that the state and federal suits "notwithstanding any differences in remedies sought or theories of recovery pleaded, shared a common gravamen," and thus were, and could validly be,

The fact that petitioners' objections were framed under federal law and the United States Constitution in no way diminishes the binding effect of the Delaware judgment. This Court has held that a state court's determination of constitutional issues concerning jurisdiction and due process is entitled to the same full faith and credit as any other judgment. *Underwriters Nat'l Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 706, 714 (1982). *See also Allen* v. *McCurry*, 449 U.S. 90, 101 (1980) (state court determination of issue under Fourth Amendment entitled to binding effect in federal action under Section 1983). Indeed, this is true even if hypothetically the state court "may have made an error of law." *Underwriters Nat'l Assurance Co., supra*, 455 U.S. at 709 n.16.

Petitioners' argument that this principle somehow does not apply because the Delaware judgment was entered after a settlement rather than a trial on the merits is wholly unsupported and proves too much: (1) as noted above, the judgment would be given effect by the Delaware courts, which is conclusive on the question of its effectiveness for purposes of full faith and credit; (2) petitioners "fully and fairly litigated" these issues, which involve questions of law as to which further factual adjudication would have added nothing; and (3) to accept petitioners' argument that class action judgments entered after judicially approved settlements are not entitled to recognition from other courts would eviscerate Rule 23(e) of the Federal Rules of Civil Procedure and similar provisions under state law.

---

embraced within the Delaware settlement, *id.* at 33-34; and (4) *Nottingham* had nothing to do with "exhaustion of remedies" (Pet. 14 n.14), but rather turned on the fact that the plaintiffs there, like those here, had already had their day in court on their challenges to the settlement, *id.* at 32.

3. Having Litigated Their Claim in the Delaware Courts that the State Court Judgment Could Not Release Their Federal Claims, Petitioners May Not Relitigate that Claim in the Federal Courts

No serious question is raised by petitioners' argument that the federal courts should not have given effect to the Delaware judgment because it precluded claims under the federal securities laws. As with petitioners' other arguments here, this argument, too, was raised by petitioners in the Delaware state proceedings (and on their first petition for certiorari to this Court), and petitioners are simply foreclosed from relitigating the issue in their federal action. *See Underwriters Nat'l Assurance Co., supra*, 455 U.S. at 706, 714; *Nottingham Partners* v. *Trans-Lux Corp., supra*, 925 F.2d at 33.

In any event, the courts have uniformly held that a state court may validly authorize a class representative to release claims on behalf of a class that would be outside the state court's adjudicatory jurisdiction. *See Nottingham Partners* v. *Trans-Lux Corp., supra*, 925 F.2d at 33-34; *TBK Partners, Ltd.* v. *Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1413 (D. Ariz. 1989), *aff'd sub nom. Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268 (9th Cir.), *cert. denied*, 113 S. Ct. 408 (1992); *Bernstein* v. *Mediobanca Banca di Credito Finanziario-Societa Per Azioni*, 78 F.R.D. 1, 2 (S.D.N.Y. 1978); *Lowenschuss* v. *Resorts Int'l, Inc.*, Civ. A. No. 89-1071, 1989 U.S. Dist. LEXIS 7407, at *20 n.15 (E.D. Pa. June 29, 1989). *See also* Charles A. Wright et al., *Federal Practice and Procedure* § 4470 at 688-89 (1981).*

---

* These holdings are consistent with this Court's ruling in *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), that, under 28 U.S.C. § 1738, exclusive federal claims may be extinguished by a state court judgment so long as a state court would give

The cases cited by petitioners are not to the contrary. *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), held only that class representatives cannot agree to release claims arising from different *factual* circumstances than those underlying their own claims. *Id.* at 16-18. Indeed, *National Super Spuds* made clear that a class settlement *can* release claims "relying on a legal theory different from that relied upon in the class action complaint but depending upon the very same set of facts." 660 F.2d at 18 n.7. And, in *TBK Partners, supra*—decided *after National Super Spuds*—the Second Circuit confirmed that "a state court [has authority] to approve a settlement that releases a claim within the exclusive jurisdiction of the federal courts" and that "a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action *even though the claim was not presented and might not have been presentable in the class action.*" *TBK Partners, supra*, 675 F.2d at 460 (emphasis added).*

---

such effect to its judgment. In this case, the Court of Chancery specifically held that the release would embrace all claims relating to the merger, including those arising under the federal securities laws, and, as noted above, there is no question that the Delaware courts would give this judgment full effect.

* *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979), also cited by petitioners, involved a settlement of a class action for damages under Fed. R. Civ. P. 23(b)(3), in the extraordinary procedural context where the district court purported to dismiss federal claims of class members whether or not they accepted settlement benefits or agreed to an individual release embracing both federal and state claims. The Court of Appeals found the settlement defective on a number of procedural and substantive grounds, principally that the form of settlement subverted the opt-out rights of the Rule 23(b)(3) class members. *Id.* 594 F.2d at 1123-37. The case has never been understood to hold that the scope of a class release must be limited to the subject matter jurisdiction of the court in which the class action was brought. *See, e.g., In re Corrugated Container Antitrust Litig., supra*, 643 F.2d at 222 n.40. Likewise, *Piambino* v. *Bailey*, 610 F.2d 1306, 1332-34 (5th Cir.), *cert. denied*, 449 U.S. 1011 (1980), merely held that under

In this case, the purported federal claims clearly arose from and concerned "the very same set of facts" as the class' state law claims—including the claim that MCCA's directors breached their "duty of complete candor" to shareholders by purportedly misrepresenting the terms of the merger agreement in the proxy statement soliciting shareholder approval of the merger. *See* 109A (Court of Chancery Order denying preliminary injunction motion) ("[t]his case . . . presents at this stage *principally a question of the adequacy of the disclosure made in the joint solicitation of proxies* in connection with the MCCA shareholder approval of the Agreement") (emphasis added). *See also Nottingham Partners* v. *Trans-Lux Corp.*, *supra*, 925 F.2d at 33.

In sum, in affirming the judgment of the District Court, the Third Circuit applied well-established principles of full faith and credit to the Delaware state court judgment. In doing so, it followed the teachings of this Court and every other Court of Appeals faced with a similar issue.*

---

the Anti-Injunction Act, there was no basis upon which the District Court could properly enjoin the enforcement of a judgment obtained in a state court action.

* There is pending in this Court an application for certiorari entitled *Grimes* v. *Vitalink Communications Corp.*, *petition for cert. filed* (June 29, 1994) (No. 93-2098) (reported below at 17 F.3d 1553 (3d Cir. 1994)). That application is brought by others who unsuccessfully sought in the Third Circuit to maintain a collateral attack on a Delaware judgment approving settlement of a class action. Although we believe that for reasons made clear in *Ticor*, there is no reason for certiorari to be granted in that case, we note that there are differences between the cases so that a grant of certiorari in *Grimes* would in no way warrant grant of certiorari in this case. In contrast to petitioners here, neither of the petitioners in *Grimes* was an actual party to the Delaware proceeding (one lodged an objection to the settlement but did not himself assert any claim in Delaware; the other never lodged an objection and, indeed, did not enter any appearance in Delaware). Moreover, in *Grimes*, the petitioners stress that the federal claims they sought to bring had "next to nothing in common" with the claims before the state court and were not properly evaluated by the state court in approving the release. Here, by contrast,

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KEVIN D. MCDONALD*
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Suite 600
Washington, D.C. 20005-2008
(202) 879-3939

Attorneys for Xavier W. Nady, John N. Palmer, C. Victor Raiser, II, Thomas G. Barksdale, R. Faser Triplett, M.D., and E. Lee Walker

WARREN R. STERN*
BEN M. GERMANA
WACHTELL, LIPTON, ROSEN
& KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

Attorneys for Respondents BellSouth Corporation and Mobile Communications Corporation of America

* *Counsel of Record*

petitioners concede that they raised the same nondisclosure claims based upon the same proxy language in both courts, and that the Chancellor thoroughly analyzed the potential value of their federal claims (some of which he suspected might be "frivolous or irresponsible") in approving the class settlement. *See* 90A-96A.

APPENDIX

APPENDIX

Aaron FLECK, et al.,

Petitioners,

v.

MOBILE COMMUNICATIONS CORPORATION OF AMERICA, INC., *et al.*

No. 91-1773.

Petition for writ of certiorari to the Supreme Court of Delaware.

June 29, 1992.

Denied.